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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK M. HYATT, HERMAN O. CAUDLE AND MARY P. LOVINGOOD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

MARGARET M. HECKLER, or her successors in office, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

and

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN R. WESTER
(Counsel of Record)
DAN T. COENEN
ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
Charlotte, North Carolina 28246
(704) 377-2536
Attorneys for Petitioner

CHARLES MCBRAYER SASSER
LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
6th Floor, 951 South Independence Boulevard
Charlotte, North Carolina 28202
(704) 376-1608

QUESTIONS PRESENTED

I. HAS CONGRESS STRIPPED FEDERAL COURTS OF THE POWER TO ENJOIN THE SECRETARY OF HEALTH AND HUMAN SERVICES' DELIBERATE AND SYSTEMATIC REFUSAL TO FOLLOW THE CONTROLLING LAW OF THE VERY CIRCUIT IN WHICH SHE ACTS?

II. IS THE 60-DAY REQUIREMENT OF THE SOCIAL SECURITY ACT'S JUDICIAL REVIEW PROVISION, 42 U.S.C. §405(g), JURISDICTIONAL, RATHER THAN A STATUTE OF LIMITATIONS, SO THAT IT NECESSARILY DEFEATS CLAIMS OF PERSONS VICTIMIZED BY THE SECRETARY'S POLICY OF IN-CIRCUIT NONACQUIESCENCE?

III. DOES §405(g) REQUIRE EXHAUSTION OF THE SECRETARY'S PROCEDURES WHENEVER A PLAINTIFF CHALLENGES THE APPLICATION OF AN IMPROPER STANDARD FOR ENTITLEMENT, AND IN PARTICULAR WHEN THE PLAINTIFF ATTACKS THE SECRETARY'S ABUSE OF THE ADMINISTRATIVE PROCESS BY PURSUING A POLICY OF IN-CIRCUIT NONACQUIESCENCE?

IV. DOES JURISDICTION EXIST UNDER THE FEDERAL MANDAMUS STATUTE, 28 U.S.C. §1361, OVER THE CLAIMS OF PLAINTIFFS IN THIS NONACQUIESCENCE ACTION WHO HAVE NOT EXHAUSTED ADMINISTRATIVE REMEDIES OR STRICTLY COMPLIED WITH THE 60-DAY REQUIREMENT UNDER SECTION 405(g)?

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NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DISABILITY DETERMINATION SERVICES,

Intervenor-Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Patrick H. Hyatt, *et al.*, petition this Court for a writ of certiorari to review the March 20, 1985 judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The District Court rendered its Findings of Fact, Conclusions of Law and Decision on February 14, 1984.

A-58.[1] Its judgment was filed the same day. A-92. These materials are published at 579 F. Supp. 985. On March 27, 1984, the District Court entered its Order Certifying Class and Requiring Notice. A-95. That Order is not published. The Decision of the Fourth Circuit Court of Appeals was rendered on March 20, 1985, A-43, and is published at 757 F.2d 1455 (4th Cir. 1985).[2]

JURISDICTION

The Court of Appeals entered judgment on March 20, 1985. A-43. All parties filed timely petitions for rehearing in the Court of Appeals on April 3, 1985, and the Court denied these petitions on April 23, 1985. A-57. On July 3, 1985, the Chief Justice granted petitioners an extension of time within which to seek a writ of certiorari through September 20, 1985. A-42. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

PERTINENT STATUTES AND PROVISIONS

This case involves a number of constitutional provisions (*see* Art. II, §3; Art. III, §1; and Amend. 5); statutes (*see* 42 U.S.C. §405(g) & (h); 28 U.S.C §§1361 & 1651; Pub. L. No. 98-460, 98 Stat. 1794), and administrative pronouncements (*see* 20 C.F.R. §§404.1529, 404.1633(b), 416.1033(b) and subpart P, App. 1, §4.00C; SSR 82-55; SSR 82-58; SSR 81-6; SSR 82-49c; SSR 82-64). These materials are set forth in the Appendix. *See* A-1–34.

STATEMENT OF THE CASE

Pursuant to a systematic national policy, the Secretary of Health and Human Services has directed Social Security claims adjudicators to disregard the established law of

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[1]The Appendix to this petition is cited as "A."

[2]The District Court also rendered an Amended Order Allowing Attorneys' Fees on May 8, 1984. A-102; 586 F. Supp. 1154. The Secretary took a separate appeal from that Order, which the Fourth Circuit disposed of in its decision by remanding for reconsideration of the fee award in light of its opinion. No attorneys' fee question is presented here.

the federal judicial circuits in which they sit. In some instances the Secretary has announced formally her nonacquiescence in particular Court of Appeals decisions.[3] In other instances she has accomplished the same result by insisting that adjudicators adhere to her Social Security Rulings ("SSRs") and the provisions of her Program Operations Manual System ("POMS"), notwithstanding conflicting circuit court authority. A-78–79.

This is one of several class actions brought in response to the Secretary's policy of in-circuit nonacquiescence.[4]

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[3]For example, in Social Security Ruling ("SSR") 82-49c, A-25, the Secretary announced her decision to nonacquiesce in *Patti v. Schweiker,* 669 F.2d 582 (9th Cir. 1982), which rejected the "current medical evidence" test used by the Secretary in making decisions whether to terminate persons already receiving benefits. The Fourth Circuit followed *Patti* in *Dotson v. Schweiker,* 719 F.2d 80 (4th Cir. 1983), one of the controlling circuit court decisions on which this action has focused.

[4]The term "nonacquiescence" is used most frequently in reference to decisions by the Internal Revenue Service not to follow Court of Appeals interpretations of the Internal Revenue Code in *other* judicial circuits. The Secretary's policy of in-circuit nonacquiescence, by contrast, requires agency decisionmakers to disregard controlling decisions of the Court of Appeals of the very circuit in which those decisionmakers act and the claimant resides. *See Lopez v. Heckler,* 725 F.2d 1489, 1503 n.12 (9th Cir. 1984). (There follows a full collection of citations in *Lopez,* a nonacquiescence case to which this Court has already devoted substantial attention: 572 F. Supp. 26 (C.D. Cal. 1983) (awarding preliminary injunction granting class-wide relief), *stay denied,* 713 F.2d 1432 (9th Cir. 1983), *stay granted pending disposition by Court of Appeals,* 104 S. Ct. 10 (No. A-145, Sept. 9, 1983) (Rehnquist, J., sitting as Circuit Justice), *emergency motion to vacate stay denied,* 104 S. Ct. 221 (No. A-145, Oct. 11, 1983), *with dissenting opinions at* 104 S. Ct. 221 (Stevens, J., joined by Blackmun, J.) & 104 S. Ct. at 225 (Brennan, J., joined by Marshall, J.), *District Court's order substantially aff'd,* 725 F.2d 1489 (9th Cir. 1984), *partial stay granted pending Supreme Court review,* 104 S. Ct. 2164 (No. A-707, Apr. 30, 1984), *vacated and remanded in light of Social Security Disability Reform Act of 1984,* 105 S. Ct. 583 (No. 84-115, Dec. 10, 1984).)

The named plaintiffs claimed to be victims of the Secretary's policy. They sued on behalf of themselves and other such victims found not to be disabled and thus ineligible for Social Security Disability Insurance ("SSDI") benefits or Supplemental Security Insurance ("SSI") benefits under Titles II and XVI of the Social Security Act.

The plaintiffs challenged the Secretary's policy of non-acquiescence in general. They also challenged in particular her resulting failure to abide by three specific Fourth Circuit decisions: *Martin v. Secretary of HEW*, 492 F.2d 905 (4th Cir. 1974); *Myers v. Califano*, 611 F.2d 980 (4th Cir. 1980); and *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983). In *Martin*, the Fourth Circuit held that a showing of end-organ damage (*i.e.*, injury to the brain, heart, kidneys or eyes) was not necessary to establish a disability resulting from hypertension or diabetes mellitus. 492 F.2d at 905–06, 909–10. In *Myers* and earlier cases, the Fourth Circuit held that a claimant who proves a pain-inducing condition may establish a disability based exclusively on subjective reports of the intensity and effects of the pain. 611 F.2d at 983; *see Thorne v. Weinberger*, 530 F.2d 580, 583 (4th Cir. 1976); *Mode v. Celebrezze*, 359 F.2d 135, 137 (4th Cir. 1966). In *Dotson*, the Fourth Circuit rejected the "current medical evidence" test used by the Secretary to terminate existing beneficiaries without any showing of medical improvement. 719 F.2d at 81–82.

Plaintiffs alleged that the Secretary's decision-makers were not applying the governing disability rules established in the Fourth Circuit by *Martin*, *Myers* and *Dotson* because the Secretary insisted on adherence to her own regulations, SSRs and POMS. The Secretary's actions, according to plaintiffs, violated the separation-of-powers principle and due process clause of the United States Constitution, the rule of *stare decisis*, the Administrative Procedure Act and the Social Security Act. A-62. Plaintiffs based their claim of federal court jurisdiction on 28 U.S.C. §1331, 28 U.S.C. §1361, and the Social Security

Act's judicial review provision, 42 U.S.C. §405(g). *See* A-51, 54.

The case went to trial before the Honorable James B. McMillan. After hearing the evidence, Judge McMillan found as a fact that the Secretary was pursuing a "continuing policy" of "refusal to comply with court decisions with which she disagrees." A-79. He also found that agency decision-makers in North Carolina in fact were failing to follow the holdings of *Martin, Myers* and *Dotson.* A-72–76, 85–88, 90–91. The Secretary's policy, according to Judge McMillan, violated both the principle of constitutional separation of powers, A-85–91, and the due process clause, A-91. Finding far-reaching irreparable injury, A-77, 83, Judge McMillan issued an injunction ordering the Secretary to "cease immediately her policy of refusing to follow the law of the Fourth Circuit" and to "issue written directives" instructing persons administering disability programs in North Carolina to follow Fourth Circuit standards. A-92. The injunction also ordered the Secretary to begin following the Fourth Circuit's rulings in *Martin, Myers* and *Dotson.* A-92.

By separate Order dated March 26, 1984, Judge McMillan certified a class of plaintiffs entitled to receive reconsideration of their claims by the Secretary pursuant to the standards established in *Martin, Myers* and *Dotson.* A-95.[5]

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[5]This class comprised three subclasses: (1) those North Carolina residents whose benefits were terminated without compliance with *Dotson* after October 6, 1982; (2) those North Carolina residents whose benefits were terminated without compliance with *Martin* or without compliance with *Myers* after September 10, 1981; and (3) those North Carolina residents whose claims for initial benefits were denied without compliance with *Martin* or without compliance with *Myers* after September 10, 1981. A-95–96.

The certified class included persons whose claims had been last denied more than 60 days before the assertion of their claims in this lawsuit and also included persons who had not exhausted all levels of administrative review in pursuing their claims.[6]

The Secretary appealed to the Fourth Circuit. After oral argument in that Court, Congress enacted and President Reagan signed the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* (the "new Act" or "1984 Act"). A-5. The new Act did not treat the subject of hypertension and diabetes mellitus, on which the plaintiffs' *Martin* claim was based. It did, however, set forth a new statutory standard for analyzing subjective allegations of pain, thus affecting the claim based on *Myers.* 1984 Act §3. With respect to *Dotson,* the new Act included a new statutory "medical improvement" provision. *Id.* §2(a)–(c). In addition, the Act directed courts to award a new administrative review, applying this standard, to any terminee who was a "member of a class certified on or before September 19, 1984 in a class action relating to medical improvement." *See id.* §2(d)(3)(B).

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[6]There are four levels of agency review in the making of disability determinations. *See generally Heckler v. Day,* ___ U.S. ___, 104 S. Ct. 2249, 2251 (1984). The initial determination is made by an employee of a state agency under contract with the Social Security Administration ("SSA") and bound to follow its directives. *See* 42 U.S.C. §§421(a); 1383b(a); 20 C.F.R. §§404.1503, 416.903. If the initial disability decision is adverse, the claimant may seek a *de novo* reconsideration, again before the state agency. *See* 20 C.F.R. §§404.904, 404.907 to .921, 416.1405, 416.1407 to .1421. Upon receiving an adverse reconsideration decision, the claimant may obtain review before an administrative law judge ("ALJ") in SSA's Office of Hearings and Appeals. *See* 42 U.S.C. §421(d); 42 U.S.C. §1383(c)(1); 20 C.F.R. §§404.929 to .965, 416.1429 to .1465. Finally, the claimant may seek review by the SSA's Appeals Council. *See* 20 C.F.R. §§404.967 to .983, 416.1467 to .1483.

Relying extensively on the new Act and its legislative history, the Fourth Circuit vacated the District Court's judgment and remanded with detailed instructions. A-43. The Court of Appeals did not overturn the basic determination of the District Court that the Secretary had nonacquiesced in Fourth Circuit law, including in her failure to follow *Martin*.[7] The Court of Appeals also did not question the District Court's conclusions that nonacquiescence is illegal and that the Secretary's policy was causing irreparable injury. The Court, however, cut back on the relief ordered by the District Court in two respects.

First, the Court concluded that *Heckler v. Day*, ___ U.S. ___, 104 S. Ct. 2249 (1984), and the legislative history of the 1984 Act precluded the award of injunctive relief in a nonacquiescence case. A-49–50. As a result, the Court of Appeals vacated those portions of the District Court's judgment enjoining the Secretary to discontinue her refusal to follow Fourth Circuit law and to issue notices to her decisionmakers to follow Fourth Circuit standards. A-50, 55. For the same reason, the Court vacated that portion of the District Court's judgment enjoining the Secretary to follow *Martin* in the future, including in reevaluating the claims of proper class members suffering from hypertension and diabetes. A-50, 55.[8]

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[7]In the Court of Appeals, the Secretary challenged only the District Court's findings of nonacquiescence, while not seeking to defend the legality of the practice. In light of its other rulings, the Fourth Circuit did not focus at length on the parties' dispute over whether the Secretary had nonacquiesced. It did, however, describe the *Martin* subclass as "includ[ing] claimants whose benefits were terminated because the Secretary did not follow this circuit's precedent," A-48, and remanded the claims of initial-applicant *Martin* class members to the Secretary "for reconsideration of her policy of nonacquiescence." A-56.

[8]Instead, proper *Martin* class members were to receive a "[r]emand to the Secretary for reconsideration of her policy of nonacquiescence in light of the 1984 Act's legislative history and circuit precedent." A-56. The court also vacated the injunctions requiring compliance with *Dotson* and *Myers*, but did so because the 1984 Act superseded *Dotson*'s

Second, the Court applied in a restrictive manner the Social Security Act's judicial review provision, 42 U.S.C. §405(g), to reduce the number of initial applicants in the class entitled to new hearings. In particular, any initial applicant was excluded from class membership unless he or she fully exhausted administrative remedies and did so not more than 60 days before the assertion of the class claims for relief. A-51–53. The Court also held that initial applicants thus failing to establish jurisdiction under section 405(g) could not invoke mandamus jurisdiction under 28 U.S.C. §1361. A-20.[9]

On June 25, 1985, pursuant to the mandate of the Fourth Circuit, the District Court entered an Order providing relief to those class members recognized as entitled to relief by the Fourth Circuit. A-119. This relief is now being administered. By way of this petition, petitioners seek two things. First, they seek to secure reinstatement in the class of those persons excluded from the class by the Fourth Circuit. Second, they seek to have reinstated prospectively the injunctive relief concerning nonacquiescence in general and *Martin* in particular that was vacated by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant the Writ to Consider Whether Congress has Stripped the Federal Judiciary of the Power to Issue Injunctions to Remedy Nonacquiescence.

1. Federal District Courts must and do have the power to enjoin the Secretary's unconstitutional policy of nonacquiescence.

and *Myers'* treatment of medical improvement and pain. The dissolution of that portion of the injunction concerning *Dotson* and *Myers* is not challenged here.

[9]The Court held that all persons whose benefits were *terminated* and who were included in the class as certified by the District Court were entitled to reconsideration of their claims without regard to exhaustion or the 60-day rule, because section 2(d) of the new Act specifically dictated that result. A-47–48.

In *Califano v. Yamasaki*, 442 U.S. 682, 704–07 (1979), this Court unanimously upheld the power of federal courts to certify classes and to issue injunctions in Social Security cases. The District Court relied on *Yamasaki* in issuing injunctive relief in this case. A-79. The Fourth Circuit, however, vacated the District Court's award of injunctive relief in reliance on *Heckler v. Day*, ___ U.S. ___, 104 S. Ct. 2249 (1984). A-49–50, 55.

In *Day*, a closely divided Court held that prior congressional actions foreclosed one specific type of injunction in Social Security cases — namely, an injunction requiring the Secretary to comply on a statewide basis with fixed time limits for making eligibility determinations. The Court reasoned that Congress had refused to impose such limitations "almost annually" since 1975, *id.* at 2254-55; that Congress had selectively imposed time limits on Social Security decisionmakers making eligibility determinations in other contexts, *id.* at 2257; and that the legislative history even condemned recent judicial decisions imposing exactly the sort of injunction at issue in the case, *id.* at 2255-56 & n.26. The legislative materials, according to the Court, revealed "Congress's unequivocal determination that mandatory deadlines were inappropriate." *Id.* at 2258 n.32. The Court noted that "we rarely see as clear an expression of legislative intent." *Id.* at 2257 n.30.

In this case the Fourth Circuit pointed to the 1984 Act in reasoning that:

> The controversy over nonacquiescence presents an analogous situation. The conferees deleted a provision of the House bill that would have required acquiescence in circuit precedent in the absence of appeal. *See* Conference Report at 37, 130 Cong. Rec. at H9831. Following the reasoning of *Day*, we cannot approve an injunction imposing the same restraints that Congress rejected.

A-50.

In fact, this case is not remotely similar to *Day*. In *Day*, for example, Congress had endorsed the Secretary's policy

"almost annually" for a decade, 104 S. Ct. at 2254–55; the subject of nonacquiescence, however, first became a serious subject of possible legislation only as Congress framed the 1984 Act. The record in *Day* revealed focused rejection of bills specifically designed to impose fixed deadlines, *id.* at 2254 & 2255 n.23; in contrast, a Conference Committee deleted a nonacquiescence section from the 1984 Act as part of a complex compromise on a multifaceted bill that, as enacted, covered 16 different subjects. In *Day*, Congress had considered generally the subject of fixed deadlines, *id.* at 2254, 2257; here neither the House bill nor the Senate bill spoke at all to the subject of *past* decisions to nonacquiesce, which this case specifically concerns. Finally, *Day* involved injunctive relief for only a statutory violation, *id.* at 2252, while this case involves a question of constitutional rights and remedies. Each of these distinctions is substantial, but two *other* features of the new Act's legislative history negate any possible suggestion that *Day* applies here.

First, *Day* involved a situation in which Congress clearly had been persuaded by the Secretary that fixed deadlines were undesirable because they "would jeopardize the quality and uniformity of agency decisions." *Id.* at 2255; *see id.* at 2256–57 & nn.26, 29. The legislative history of the 1984 Act reveals no similar solicitude for the Secretary's policy judgment on the subject of nonacquiescence.

Both the House and Senate bills sent to the Conference Committee restricted nonacquiescence, but did so in different ways. *See* H.R. Conf. Rep. 98-1-39, 98th Cong., 2d Sess. (1984), *reprinted at* 130 Cong. Rec. at H9821, H9831 *and* 1984 U.S. Code Cong. & Admin. N. 3080, 3095.[10] The House Bill prohibited nonacquiescence in any future circuit court decision absent an appeal by the Secretary. *Id.* The Senate Bill required the Secretary to report instances of nonacquiescence to the Congress and in the

[10]That portion of the Conference Report dealing with nonacquiescence is included in the Appendix at A-16.

Federal Register, and added that "nothing in the section shall be interpreted as sanctioning any decision of the Secretary not to acquiesce in the decision of a circuit court." *Id.* In the process of producing an acceptable compromise bill, the Conference Committee finally agreed not to act *at all* on the subject of nonacquiescence. *See* 130 Cong. Rec. at H9834 (remarks of Rep. Archer). Indeed, the Committee went out of its way to make it clear that:

> The conferees do *not* intend that the agreement to drop both provisions be interpreted as approval of "non-acquiescence" by a federal agency to an interpretation of a U.S. Circuit Court of Appeals as a general practice.

130 Cong. Rec. at H9831, 1984 U.S. Code & Cong. N. at 3095 (emphasis added).

Behind the conferees' "non-approval" of nonacquiescence lay widespread skepticism and hostility toward the Secretary's policy. The Conference Report explained that "questions have been raised about the constitutional basis of nonacquiescence and many of the conferees have strong concerns about some of the ways in which this policy has been applied, even if constitutional." *Id.* at 3096. The Report went on to criticize the policy's "clearly . . . undesirable consequence" of generating repetitious appeals costly to both claimants and the government. *Id.* at 3095. It urged that, instead of nonacquiescing, the Secretary should "resolve policy conflicts promptly" either by appealing to the Supreme Court or by seeking legislative action. *Id.* Representative Pickle, who was principally responsible for the legislation in the House, reported that the Conference Report "sends a clear signal to the administration that the present policy of nonacquiescence is *not acceptable.*" 130 Cong. Rec. at H9836 (emphasis added).

This legislative record stands in stark contrast to Congress's resounding *endorsement* of the policy judgment of the Secretary revealed by the legislative record in *Day*. It is simply unreasonable to infer from the Conference Committee's actions a decision to abolish necessary judicial

remedies for victims of the very practice that the Conference Report criticized and about which "many of the conferees" had such "strong concerns." *See Steiberger v. Heckler*, 84 CIV 1302 (LBS) (S.D.N.Y. Aug. 19, 1985), slip op. 114–15.

Second and even more importantly, Congress, in electing not to legislate on the subject, recognized and relied on the continuing authority of the judiciary to respond to the Secretary's policy of nonacquiescence. 130 Cong. Rec. at H9831, 1984 U.S. Code Cong. & Admin. N. at 3095. Even the less restrictive Senate proposal retained full authority in the courts to deal with nonacquiescence by expressly *not* "sanctioning any decision . . . not to acquiesce." *Id.* The Senate took this approach because "if a constitutional issue is involved, it *cannot* be settled in this legislation." Sen. Rep. 98-466, 98th Cong., 2d Sess. at p.21 (May 18, 1984) (emphasis added). The Conference Committee gave an even more explicit indication of deference to the judiciary when it observed that:

> The conferees also feel that in addition to the practical administrative problems which may be raised by nonacquiescence, *the legal and Constitutional issues raised by non-acquiescence can only be settled by the Supreme Court.*

130 Cong. Rec. at H9831; 1984 U.S. Code Cong. & Admin. N. at 3096 (emphasis added); *see also* 130 Cong. Rec. at 9834 (remarks of Rep. Archer).

As these statements indicate, Congress distinguished between "the practical administrative problems" raised by nonacquiescence and "the legal and Constitutional issues" presented by the Secretary's policy. Congress considered legislating with respect to the practical problems but ultimately decided only to "jawbone" the Secretary about these problems in the Conference Report. In contrast, Congress consistently disclaimed any intention to intervene on the "legal and Constitutional issues" committed to the judiciary. It makes no sense to find a contraction of

the judicial power when Congress recognized and relied on the courts' ability to exercise that power.

"Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *see generally Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). This rule obviously applies with special force when constitutional rights are at stake. *See, e.g., Califano v. Sanders*, 430 U.S. 99, 109 (1977).[11] Applying any test, however, there is no reasonable way to infer from this legislative history a congressional intent to withdraw the

[11]In an analogous context, this Court has refused to find a congressional displacement of a constitutional damages remedy unless "Congress has provided an alternative remedy which it has *explicitly declared* to be a substitute for recovery . . . and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (emphasis added). *A fortiori*, "an explicit congressional declaration," *Davis v. Passman*, 442 U.S. 228, 246–47 (1979), should at a minimum be required to defeat the generally available constitutional remedy of enjoining wrongs found to threaten irreparable harm. *See Carlson, supra*, 446 U.S. at 42–44 (Rehnquist, J., dissenting).

judicial power to issue injunctions in nonacquiescence cases.[12]

2. The Court of Appeals' decision to vacate the injunction to follow *Martin* is especially objectionable.

The Court of Appeals' reading of *Day* led it to vacate even that portion of the District Court's injunction requiring the Secretary to comply with the Social Security Act as interpreted in *Martin*. This aspect of the Fourth Circuit's decision creates a profound anomaly that makes its decision especially objectionable.

Based on overwhelming evidence, the District Court found as a fact that agency decisionmakers were applying the Secretary's directives to reject disability claims based on hypertension or diabetes mellitus unless those conditions were accompanied by end-organ damage. A-73. This practice was and is flatly inconsistent with the dictates of the Social Security Act as interpreted in *Martin v. Califano, supra*. Finding widespread irreparable injury, A-77, 83, the Court enjoined this illegal practice by ordering the Secretary to "begin immediately to follow the law of the Fourth Circuit within North Carolina as it is expressed in *Martin* . . . ." A-92. Stated otherwise, the Court ordered the Secretary to "stop denying claims for Social Security disability benefits based on hypertension or diabetes mellitus upon the theory that without end-organ damage (to the heart, eyes, kidneys or brain), the claimant does not have a 'severe impairment.'" A-58.

Apart from any controversy over nonacquiescence, this injunction plainly would have been proper under *Yamasaki*. The Fourth Circuit, however, vacated this injunction because the Secretary's practice *resulted from*

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[12]Not even the Secretary advocated the reading of the new Act created by the Fourth Circuit, despite her filing of an extensive Supplemental Brief and Reply Brief in that Court detailing her views of the new Act's effect on this case. The Fourth Circuit's novel and sweeping reliance on *Day* and the legislative history of the 1984 Act was developed entirely *sua sponte*.

her policy of nonacquiescence — that is, her intentional refusal to heed the existing and controlling decision in *Martin*. A-50. This result makes no sense. If courts can enjoin violations of the Social Security Act as a general matter, they must be able to enjoin violations of the Act resulting from the Secretary's flagrant persistence in conduct already held to be unlawful in a controlling circuit court decision. In this case, however, the Fourth Circuit vacated just such an injunction.

In vacating the District Court's injunction, the Fourth Circuit committed patent error. This Court should grant the writ to review the Fourth Circuit's dangerous and anomalous extension of *Heckler v. Day*.[13]

3. Whether courts retain the power to enjoin nonacquiescence is a matter of extraordinary importance to the federal judiciary and disabled citizens throughout the nation.

The Secretary's policy of nonacquiescence has raised one of the most visible and significant constitutional issues of the present day. The Fourth Circuit's holding that courts may not halt the Secretary's practice wars with the fundamental tenet that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803). Its ruling also conflicts with a recent and comprehensive decision specifically concluding that the Fourth Circuit erred in applying the 1984 Act. *Steiberger v. Heckler, supra*, slip op. at 113–17 ("*Hyatt* and *Day* are not analogous").

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[13]Indeed, plaintiffs submit that the lower court's misapplication of *Day* is so clear that this Court should consider either summarily reversing or vacating and remanding for full consideration of the legislative history of the 1984 Act, after the parties have been given an adequate opportunity to address this important issue. *See* note 12 *supra*.

The Fourth Circuit's dissolution of the District Court's injunction is of acute human significance to Social Security claimants throughout North Carolina and the Fourth Circuit. The question whether courts can issue injunctions to remedy nonacquiescence is also of pressing importance generally. Thus, although the Secretary has announced a complex modification of her nonacquiescence policy at the ALJ and Appeals Council levels, *see* Interim Circular No. 185 (A-35), decisionmakers at the initial-decision and reconsideration levels remain obligated to follow the Secretary's pronouncements regardless of circuit court law. *See, e.g.*, Social Security Forum, Vol. 7, No. 6 (June 1985) (noting acting Commissioner's acknowledgment of continued nonacquiescence at these levels); *Steiberger v. Heckler, supra,* slip op. at 102-03 (collecting similar testimony). Non-acquiescence at these levels is of the greatest practical importance, since all claims are initially resolved in these proceedings and many, if not most, are finally resolved there. *Id.* at 103. The American Bar Association has recently resolved that it "urges the Social Security Administration to observe, *in all stages of administrative proceedings,* the applicable decisions of the United States Court of Appeals for the circuit in which the matter has arisen, subject to the agency seeking review in the United States Supreme Court." American Bar Association Resolution, passed July 10, 1985 (emphasis added), *reprinted at* A-41. These factors, in addition to the extraordinary extension of this Court's *Day* decision by the Court of Appeals, indicate that the Writ should issue in this case.

B. The Court Should Grant the Petition to Consider Important Issues Dividing the Circuits in the Application of the Social Security Act's Judicial Review Provisions.

For a person to qualify as a member of a plaintiff class in a Social Security case, his or her individual claim must be properly before the court. *E.g., Califano v. Yamasaki,* 442 U.S. 682, 701 (1979); *Weinberger v. Salfi,* 422 U.S. 749, 763–764 (1975). Persons asserting claims "arising

under" the Social Security Act may *not* base their claims on federal-question jurisdiction under 28 U.S.C. §1331. *E.g., Heckler v. Ringer,* ___ U.S. ___, 104 S. Ct. 2013, 2021–2022 (1984). The reason is that the Social Security Act expressly precludes such jurisdiction, 42 U.S.C. §405(h), and sets forth its own judicial-review provision, 42 U.S.C. §405(g). Section 405(g) provides:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

Relying on *Mathews v. Eldridge,* 424 U.S. 319 (1976), the District Court concluded that this was the type of case in which full exhaustion was not required to secure a "final decision" subject to judicial review. A-80–84. It also concluded that the 60-day rule of section 405(g) was not strictly applicable in this action challenging purposeful in-circuit nonacquiescence. A-97–98. The Fourth Circuit overturned the District Court's rulings on both these points, and also held that mandamus jurisdiction was unavailable to claimants not strictly complying with section 405(g). A-51–54. The Court of Appeals' holding on all three of these issues conflicts with decisions of other circuits. In addition, the panel's holding that the 60-day rule is jurisdictional directly conflicts with prior pronouncements of this tribunal. These issues are of extraordinary importance. Indeed, the Secretary has estimated that their resolution affects some 56,000 persons in this case alone. A-128. For these reasons, these issues warrant full review by this Court.[14]

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[14]In his pending Petition for Certiorari in *Heckler v. Polaski,* No. 85-55 (filed July 11, 1985), the Acting Solicitor General urges that that case "plainly warrants" review because the Eighth Circuit's interpretation of section 405(g) conflicts with the holding in this case and affects

1. The Court should grant the writ to consider whether the 60-day rule of section 405(g) is jurisdictional or a statute of limitations.

Section 405(g) states that a Social Security claimant who receives a "final decision of the Secretary" may "obtain a review . . . by civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." A fundamental issue in this case, of obviously sweeping significance, is whether this 60-day provision imposes a jurisdictional limitation on the power of courts or whether it is in the nature of a statute of limitations, subject to such doctrines as waiver and equitable tolling. This Court spoke to this issue in *Weinberger v. Salfi*, 422 U.S. 749 (1975), when it held that the 60-day requirement "specif[ies] . . . a *statute of limitations,*" which the Secretary was bound to plead as an *affirmative defense* pursuant to Fed. R. Civ. P. 8(c). *Id.* at 764 (emphasis added). *Compare* Fed. R. Civ. P. 12(b)(1) (providing for pleading of subject matter jurisdiction defense). The 60-day rule thus stood in contrast to the first requirement of a "final decision," which alone was deemed "central to the requisite grant of *subject matter jurisdiction.*" *Id.* at 764 (emphasis added). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court reaffirmed that the 60-day rule constitutes "a statute of limitations" to be pleaded as an affirmative defense. *Id.* at 328 n.9. *See also Heckler v. Day*, ___ U.S. ___, 104 S. Ct. 2249, 2253 n.14 (1984); *Heckler v. Ringer*, ___ U.S. ___, 104 S. Ct. 2013, 2033 n.25 (1984) (Stevens, J., dissenting).

Notwithstanding these controlling authorities, the Fourth Circuit in *Hunt v. Schweiker*, 685 F.2d 121 (4th Cir. 1982), concluded that the 60-day rule is *not* a statute of limitations. As stated by the Court in that case:

> Whether the 60-day filing requirement of §[405(g)] may be tolled or is a prerequisite to stating a claim

some 9,000 Social Security claims. *Id.* at 12. That logic applies *a fortiori* here.

> depends upon whether it is jurisdictional or a statute of limitations. We find that the 60-day requirement is jurisdictional . . . .

Id. at 123. Even though the panel in *Hunt* did not mention *Salfi* or *Mathews,* the panel in this case felt compelled to follow *Hunt.* A-52. Its ruling that the 60-day rule is jurisdictional conflicts not only with *Salfi* and *Mathews,* but with the decisions of at least six Courts of Appeals and numerous District Courts.[15] Moreover, the Fourth Circuit's construction of section 405(g) threatens dire consequences for many claimants seeking judicial review because it makes unavailable to them all traditional rules of tolling except as permitted in the unfettered discretion of the Secretary. No tolling rule applies, for example, even if the plaintiff refrains in good faith from bringing a duplicative suit in reliance on his membership in a class that is later decertified. *See Hunt, supra.*[16]

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[15]*See City of New York v. Heckler,* 742 F.2d 729, 737–738 (2d Cir. 1984), *petition for rehearing denied,* 755 F.2d 31 (2d Cir. 1985), *petition for certiorari pending,* No. 84–1923 (filed June 7, 1985); *Rowland v. Califano,* 588 F.2d 449,550 n.2 (5th Cir. 1979); *Johnson v. Heckler,* Nos. 85–1254, 85–1496 (7th Cir., July 30, 1985); *Mental Health Association v. Heckler,* 720 F.2d 965, 967, 973 n.19 (8th Cir. 1983); *Lopez v. Heckler,* 725 F.2d 1489, 1504–1507 (9th Cir. 1984), *with subsequent history set forth in* note 4 *supra; Hatchell v. Heckler,* 708 F.2d 578, 580 n.1 (11th Cir. 1983); *see also, e.g., Holden v. Heckler,* 584 F. Supp. 463, 483–84 (N.D. Ohio 1984); *Graham v. Heckler,* 573 F. Supp. 1573 (N.D. W. Va. 1983); *Kennedy v. Harris,* 87 F.R.D. 372 (S.D. Cal. 1980). *But see Whipp v. Weinberger,* 505 F.2d 800, 801 (6th Cir. 1974). Referring to the Fourth Circuit's decision in this case, the Solicitor General has recognized this conflict in the circuits. *See* Petition for Certiorari in *Heckler v. City of New York, supra,* at p. 29.

[16]In this case too there is good cause for applying a tolling rule: first, by analogy to the class-representative notice rule applicable in Title VII context, *see Lopez v. Heckler,* 725 F.2d at 1506–07, *citing Albemarle Paper Co. v. Moody,* 422 U.S. 405, 415 n.8 (1975); second, because the Secretary's policy of nonacquiescence involves a misleading of claimants, who have no reason to doubt that their claims have been denied based on a good-faith review honestly conducted in

In *Heckler v. Lopez*, ___ U.S. ___, ___, ___, 104 S. Ct. 10, 221, 2164 (1983), this Court twice stayed relief awarded to persons not strictly meeting the 60-day limitation, but its opportunity to speak definitively to the nature of the 60-day rule was removed by the passage of the 1984 Act. *See* 105 S. Ct. 583. The Secretary, however, has since sought review of two other decisions squarely presenting the question whether the 60-day rule is jurisdictional and squarely conflicting with the Fourth Circuit's resolution of that issue in this case. *Heckler v. City of New York*, No. 84-1923, Petition for Certiorari at 24–25 (filed June 7, 1985); *Heckler v. Owens*, No. 85-31, Jurisdictional Statement at 23–25 (filed July 5, 1985). The Court should grant the writ in this case to consider the important question whether the 60-day rule is jurisdictional.

2. The Court should grant the petition to resolve a conflict in the circuits on the question whether exhaustion is required whenever plaintiffs challenge improper eligibility standards and, in particular, when they challenge the Secretary's policy of nonacquiescence.

Under section 405(g), a Social Security claimant may seek judicial review from only a "final decision" of the Secretary. This Court has explained that this "final decision" requirement has two parts. First, a claimant must present a claim to the Secretary for action by her. This requirement is mandatory and non-waivable. *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976). Second, the claimant must normally exhaust his or her claim through each of the four levels of administrative review. *See* note 6, *supra*. This requirement, in contrast to the first, may be excused by the Secretary or by the courts. 424 U.S. at 328. In *Eldridge*, for example, this Court waived exhaustion, even over the Secretary's objection, where a former Social Security recipient challenged the failure to afford him a

compliance with settled law, *see City of New York v. Heckler*, 742 F.2d at 738; and third, because it is inequitable to let the Secretary exploit unusually strict procedural limitations to shield her flouting of controlling law from a judicial remedy, *Lopez v. Heckler*, 725 F.2d at 1506.

pretermination hearing. Endorsing an "intensely 'practical' approach" and citing the risk of loss of "collateral claims," *id.* at 331 n. 11, the Court found that "deference to the agency's judgment is inappropriate." *Id.* at 330.

The Court most recently applied these principles in *Heckler v. Ringer, supra.* In that case, four individual plaintiffs challenged the Secretary's direction to her subordinates not to reimburse Medicaid recipients for bilateral carotid body resections ("BCBRs"). This directive, however, did not apply at the ALJ level (*i.e.*, the third tier of administrative review), except as to BCBRs performed after October 28, 1980.

One plaintiff in *Ringer* had never had a BCBR. As to him, the Court concluded that the nonwaivable requirement of *presenting* a reimbursement claim was not satisfied since he had no claim to present. 104 S. Ct. at 2025. The other three plaintiffs had had the procedure performed before October 28, 1980, but had not exhausted administrative remedies. As to these plaintiffs, the Court concluded that excusing exhaustion was inappropriate for two reasons. First, these plaintiffs' claims were not "wholly 'collateral' to their claim for benefits," *id.* at 2023, since each was seeking a judicial order requiring "at bottom," *id.* at 2021, and "essentially," *id.* at 2024, reimbursement for his BCBR. Second, exhaustion was "in no sense futile," *id.* at 2024, since the challenged policy was not even applicable to these plaintiffs' claims at the ALJ level, and ALJs had granted reimbursement "overwhelmingly" in just such cases. *Id.* at 2019. While requiring exhaustion, the Court reaffirmed that "in certain special cases, deference to the Secretary's conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate." *Id.* at 2023.

The Fourth Circuit in this case read *Ringer* to require exhaustion by all plaintiffs because they were asserting "a claim that the Secretary was applying an improper standard for entitlement." A-51. *Ringer,* however, in no way

holds that every challenge involving an "improper standard for entitlement" requires exhaustion regardless of fairness and futility.

At least two Justices have rejected this contention, *Heckler v. Lopez,* 104 S. Ct. 221, 224 (1983) (Stevens, J., joined by Blackmun, J., dissenting from denial of motion to vacate stay), and there is some indication that a majority of the Court shares this point of view.[17] At least four separate post-*Ringer* decisions have also excused exhaustion by plaintiffs challenging improper standards for entitlement. *City of New York v. Heckler,* 742 F.2d 729, 736–37 (2d Cir. 1984), *petition for rehearing denied,* 755 F.2d 31 (2d Cir. 1985), *petition for certiorari pending,* No. 84-1923 (filed June 7, 1985); *Polaski v. Heckler,* 751 F.2d 943, 951–53 (8th Cir. 1984), *petition for certiorari pending,* No. 85-55 (filed July 11, 1985); *Johnson v. Heckler,* ___ F.2d ___, Nos. 85-1254 & 85-1490 (7th Cir. July 30, 1985); *Owens v. Heckler,* CV 83-2436-WMB (C.D. Cal. 1984), *appeal pending,* No. 85-31 (filed July 5, 1985). Moreover, one of these decisions — now pending before this Court — involved exactly the same pain standard challenged in this action. *Polaski v. Heckler, supra.* In many pre-*Ringer* cases, courts also excused exhaustion where plaintiffs attacked misapplication of eligibility rules. *E.g., Lopez v. Heckler,* 725 F.2d at 1503; *Kuehner v. Schweiker,* 717 F.2d 813 (3d Cir. 1983), *vacated and remanded on other grounds,* 105 S. Ct. 376 (1984). These decisions reflect a conflict with the Fourth Circuit's decision in this case, and the respondent so recognizes. *See, e.g., City of New York, supra,* Petition for Certiorari at 24

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[17]In *Lopez,* the Ninth Circuit had affirmed the District Court's award of relief to a plaintiff class that claimed that an improper standard for entitlement — *viz,* the current medical evidence standard, rather than the medical improvement standard — had been applied to them. This Court granted the Secretary's request to stay relief to persons not complying with the 60-day rule, but simultaneously *denied* her request to stay relief to persons who had not exhausted. *See* 104 S. Ct. 2164. *Lopez,* like this case and unlike *Ringer,* involved nonacquiescence.

("*Polaski* and the instant case squarely conflict on the exhaustion issue with *Hyatt v. Heckler* . . . .").

As these authorities indicate, the Fourth Circuit read *Ringer* too broadly. In *Johnson*, for example, the Seventh Circuit excused exhaustion by plaintiffs challenging a fixed rule under which the Secretary refused to consider vocational factors in the absence of a "severe impairment." The Court reasoned that the plaintiffs' claims were "demonstrably more collateral" than those in *Ringer*, because a favorable ruling would not result in benefits, but merely provide hearings in which proper standards were applied. *Johnson, supra*, slip op. at 9. Similarly, exhaustion was "more futile" than in *Ringer* because "the Secretary's published policies are not likely to be influenced or changed by the administrative appeals of any single individual; thus the issue is unsuited to resolution in the hearing process." *Id.* at 9-10. These same considerations fully apply here. *See* A-84.

More importantly, however, *Ringer* does not control this case because *Ringer* did not involve nonacquiescence. *Compare Lopez, supra*, 725 F.2d at 1501-03; *Kuehner, supra*, 717 F.2d at 824 (Becker, J., concurring). There is simply no reason to defer to agency "experience and expertise" or to give the agency "an opportunity to correct its own errors," *Weinberger v. Salfi, supra*, 422 U.S. at 765, when the need for relief springs from the agency's policy of systematically choosing to err by refusing to follow settled circuit court law. Indeed, honoring the exhaustion requirement in nonacquiescence cases works a "perversion of the administrative and judicial system," *Lopez, supra*, 725 F.2d at 1503, by *facilitating* the Secretary's flouting of controlling judicial authority and her wearing down of claimants by subjecting them to repeated proceedings conducted in conscious violation of the law.

It is the right to be free from the Secretary's unconstitutional abuse of the administrative review process that plaintiffs seek to assert in challenging nonacquiescence. If plaintiffs must endure that process to assert that right,

then the Secretary necessarily will achieve her unlawful purpose, the claimed right *ipso facto* will be defeated, and the plaintiffs will suffer "potentially irreparable injuries." *Mathews v. Eldridge*, 424 U.S. at 331 n.11; *see also Lopez, supra*, 725 F.2d at 1502 n.11 ("separation-of-powers issue is entirely collateral to the substantive claim for disability benefits").

Ringer did not address the question whether exhaustion is required in a nonacquiescence case. To resolve this important question and a conflict in the circuits, the Court should grant this petition.

3. The Court should grant certiorari to consider whether mandamus jurisdiction is available in a nonacquiescence case if jurisdiction under section 405(g) is not.

Lower courts uniformly have held that mandamus jurisdiction under 28 U.S.C. §1361 is available in appropriate Social Security cases.[18] Contrary to these many holdings, the Secretary is now urging the Court to hold that section 405(h) invariably precludes the exercise of mandamus jurisdiction in such cases. *See Heckler v. City of New York*, No. 84-1923, Petition for Certiorari at 28 (filed June 7, 1985).

On repeated occasions this Court has noted and reserved the question whether mandamus jurisdiction is ever available to a plaintiff asserting a Social Security-related claim. *Califano v. Yamasaki*, 442 U.S. 682,

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[18] *E.g., Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984) (citing "unfractured consensus in the Courts of Appeals"); *Ellis v. Blum*, 643 F.2d 68, 81 (2d Cir. 1981); *Kuehner v. Schweiker*, 717 F.2d 813, 819 (3d Cir. 1983), *vacated and remanded on other grounds*, 105 S. Ct. 376 (1984); *Starnes v. Schweiker*, 715 F.2d 134, 141–42 (4th Cir. 1983), *vacated on other grounds sub nom. Starnes v. Heckler*, ___ U.S. ___, 104 S. Ct. 2673 (1984); *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 971 n.17 (8th Cir. 1983); *Elliott v. Weinberger*, 564 F.2d 1219, 1227 (9th Cir. 1977), *aff'd in part on other grounds sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979); *Ryan v. Shea*, 525 F.2d 268, 271-72 (10th Cir. 1975).

697–98 (1979); *Norton v. Mathews*, 427 U.S. 524, 529–30 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 332 n.12 (1976). In *Ringer*, for example, the Court avoided the issue by holding that mandamus jurisdiction was not available in any event because the particular claimants in that case had an "adequate remedy in §405(g)." 104 S. Ct. at 2023.

The Fourth Circuit applied this same "adequate remedy" analysis in this case. Other courts, however, have held that section 405(g) does not afford an *adequate* remedy in nonacquiescence cases if exacting compliance with that section's procedural limitations is required. *Kuehner v. Schweiker*, 717 F.2d at 819, 827 (Becker, J., concurring); *Lopez v. Heckler, supra*, 725 F.2d at 1508; *Rivera v. Heckler*, 568 F. Supp. 235, 243 (D.N.J. 1983); *Holden v. Heckler*, 584 F. Supp. 463, 484 (N.D. Ohio 1984); *Polaski v. Heckler*, 585 F. Supp. 1004, 1006 (D. Minn. 1984), *aff'd on other grounds*, 751 F.2d 943 (8th Cir. 1984), *petition for certiorari pending*, No. 85-55 (filed July 11, 1985). Similarly, in *City of New York v. Heckler, supra*, the Second Circuit upheld mandamus jurisdiction where "class members who permitted their administrative or judicial remedies to expire were entitled to believe that their Government's determination of eligibility was the considered judgment of an agency faithfully executing the laws." *Id.* at 738, 739.

The analysis underlying these cases makes good sense. As the Ninth Circuit has observed, application of the Secretary's nonacquiescence policy *necessarily* will produce a reversal if and when the claimant wends his way in timely fashion through four levels of agency review and then sues in federal district court within 60 days. It follows that:

> Only procedural flaws in claimants' challenges offer [the Secretary] any hope of success in such courts. Thus, as we have noted above, the Secretary appears to be using the procedural requirements as a mechanism for evading the law she is required to apply.

Lopez v. Heckler, 725 F.2d at 1506. The Secretary should not be able to invoke the strict procedural limitations of section 405(g) to capitalize on her policy of nonacquiescence at the expense of the unsuspecting and disabled.

CONCLUSION

For the reasons set forth above, the Court should grant this petition and afford full review in this case. Moreover, the Court should consider the merits in this case even if it grants the petition in *City of New York* or notes probable jurisdiction in *Owens*.[19] This case, unlike those, is based on the Secretary's policy of in-circuit nonacquiescence. It follows that the jurisdictional questions in this case will not necessarily be controlled by any decision in those cases. Even more significantly, the distinct issue concerning judicial power to issue injunctions in nonacquiescence cases independently warrants review by this Court.

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[19]The Secretary has not requested plenary review in *Polaski*. See *Heckler v. Polaski, supra*, Petition for Certiorari at 13.

Respectfully submitted,

JOHN R. WESTER
(Counsel of Record)

DAN T. COENEN

ROBINSON, BRADSHAW & HINSON, P.A.
1900 Independence Center
Charlotte, North Carolina 28246
(704) 377-2536

CHARLES MCBRAYER SASSER

LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
6th Floor
951 South Independence Blvd.
Charlotte, North Carolina 28202
(704) 376-1608

Attorneys for Petitioners

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